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THE FUR-SEAL AND THE AWARD.

OUR latest experiment in international arbitration has attracted the interest not only of specialists, but also, from the peculiarity of the subject, of the world at large. Most people, probably, have been content to gather an outline of the case from the newspapers; others have gone further and endeavoured to master its numberless legal difficulties in the pages of more serious publications. A few—a very few—have struggled through the vast mass of official literature—Case, Counter-case, and Argument—wherein the “simple truth miscalled simplicity” may be supposed somewhere to exist, and have hoped the matter at an end. From both sides of the Atlantic a chorus of mixed condemnation and approval has arisen, which from its energy would seem to indicate finality. It is doubtless believed by many that the whole question is now practically decided. But as a matter of fact, this is very far from being the case. Affairs are hardly more definitely settled now than they were after the passing of the Bering Sea Act of 1891. A step has indeed been made, but it is no more than a step, and how much longer this already protracted question is likely to endure lies beyond the power of the ablest seer to forecast.

Hitherto, at all events in England, the legal points of this *cause célèbre* have been those chiefly considered. From an early period the affair resolved itself into a wrangle as to the legality of a 100-miles limit, or the justifiableness of a closed sea, whether the fur-seal was *fera natura*, and how far he was private property. All this, though eminently right and proper

in the eyes of the lawyers, was but vexation of spirit to the zoologist. For him the question was merely whether an animal of the greatest use to mankind should be permitted to perish, and, if not, what means should be adopted to ensure its preservation. That the British Government at one time clearly shared the same view is evident from the charge laid upon her commissioners. “The main object of your inquiry,” it runs, “will be to ascertain what international arrangements, if any, are necessary between Great Britain, the United States, and Russia, or any other Power, for the purpose of preserving the fur-seal race in Bering Sea from extermination.” Yet the question on people’s lips after the publishing of the award was not whether the regulations were sufficient to ensure the survival of the seal, but whether England had, or had not, “won her case.”

To a very great extent, no doubt, America was herself the cause of this main object being lost sight of. Foiled, from various reasons, in her endeavour to obtain an agreement for a close season, she fell back upon the now historic ukase of 1821, in which Alexander I. claimed the closure of Bering Sea. This attitude was apparently not long retained, for we find Mr Blaine explicitly denying it in a despatch dated December 17, 1890. “The Government has never claimed it, and never desired it,” it runs. Again a rapid *volte-face* followed, and she resumed her former position. Upon this ground, as every one knows, the case was tried. If anything could tempt to moralising, it would surely be the sight of America, the champion of

liberty, making friends with the mammon of medievalism, and sheltering herself behind the impossible decree of an autocrat. But it may well be that, in taking up this manifestly untenable position, she was but sacrificing a pawn upon the diplomatic chess-board. Arbitrators, it may be assumed, are hardly likely to give a verdict either for plaintiff or defendant upon all counts. It is, therefore, not impossible that the Government of the United States were quite willing to forego their *mare clausum* provided that they obtained satisfactory "concurrent regulations"; and in this respect it cannot be denied that they have been on the whole remarkably successful.

All this, however, belongs less to the practical and zoological side of the question than to the legal, upon which it is not within the province of this paper to dwell. Competent writers have fully discussed the case from this point of view in numerous newspapers and magazines. In 'Maga' of last month an article upon "The United States in International Law" showed conclusively how weak was her position in her contention for the sovereignty of Bering Sea. But, with the exception of a leading article in the 'Field' newspaper, no consideration of the zoological features of the case, so far as the writer is aware, has hitherto appeared. The "award," rather than the appended "regulations," has been regarded as the main point of interest; and what effect these latter may have in counteracting the threatened extinction of the fur-seal has been left almost entirely unconsidered. It is worth while, therefore, to pass them in review, and see not only how far they are likely to be of service in this

respect, but how they will affect the trade and the existence of the "pelagic" sealer.

We may pause for a moment to glance at the immediate circumstances of which the award was the outcome, and the source of the evidence upon which the arbitrators were asked to deliver their judgment. When, in 1891, with a geometrically progressive "pelagic" seal slaughter on the one hand, and free seizures of schooners on the other, matters had reached a point perilously near actual rupture, the "Seal Fishery (Bering Sea) Act" came as an interim injunction to relieve the strained relations. Nearly simultaneously commissioners of both nations were appointed to collect evidence upon every possible phase and condition of seal-life, not only in the North Pacific, but also—though here the information was not at first hand—in the few remaining parts of the southern hemisphere where different yet closely allied species of the fur-seal are still to be found. In mid-August of last year the task was completed, and the report of the British commissioners laid before the authorities. That of the United States representatives had preceded it by nearly four months. Both were practically the distinct and separate opinions of interested parties, and it was in this, as most naturalists will probably agree in thinking, that one of the greatest mistakes in the whole case was made. It would have been far better for the ensuring of a satisfactory and unbiassed settlement of the many difficult points presenting themselves, no less than for the sake of amity, that naturalists should have been chosen as commissioners who were in no way connected with either nation, and were ready to approach the subject as a mere

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problem in zoology. As it was, each side held a brief for its own country, and from the very outset difficulties arose. Lord Salisbury's instructions were to the effect that the British commissioners should "investigate, conjointly with the commissioners of the other Government, all the facts relating to seal-life in the Bering Sea." But no conjoint investigation properly so called appears ever to have been made, and the only joint report ever submitted was of almost laughable brevity. Divested of its preamble, it consisted of three lines. "We find," it states, "that since the Alaska purchase a marked diminution in the number of seals on, and habitually resorting to, the Pribilof Islands has taken place; that it has been cumulative in effect; and that it is the result of excessive killing by man." The conclusion expresses, in the language of politeness and diplomacy, the bald fact that agreement on any other point was impossible. Each side was, naturally enough, anxious to make out as strong a case as possible. The one held "pelagic" sealers as enemies of mankind; the other, scorning half measures, suggested the interdiction of all killing upon the islands. The result was the submitting of a vast mass of contradictory data to the tribunal, from which it must have been more than difficult to disentangle the skein of plain fact. Much more satisfactory would it have been could the arbitrators, instead of the two interested parties, have nominated the commissioners. They would then have had as a basis for adjudication a well-ascertained and unimpeachable series of facts.

Upon the award, strictly so called, we need not here dwell. The five points upon which the arbitrators had to decide resolved

themselves, practically, into two, —the first, whether Bering Sea could be held to be *mare clausum* —the second, whether the fur-seal when at large is *res nullius*. On each of these points the American contentions were disallowed. With regard to the first, the lawyers have spoken with no uncertain voice, and it would probably be conceded by almost every one that our adversaries' position was untenable. The second is a more debatable question, and there may still be some who remain unconvinced by the decision of the tribunal. It is rendered extremely difficult by the fact that in habit and mode of life the fur-seal is absolutely unique in the animal world. Moreover, the term *fera natura* has never been satisfactorily defined; and the question of the right of property that man may have in animals of this description is still more complicated. Blackstone, treating of the qualified property which may subsist in animals *feræ nature*, states:—

"These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases, *unless they have animum revertendi, which is only to be known by their usual custom of returning*. . . . The law, therefore, extends this possession further than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animum revertendi*. So are my pigeons that are flying at a distance from their home, . . . all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them."

It would appear then, from this,

that the *animus revertendi* is to be regarded as a sufficient qualification in wild animals in which man can claim property, and this characteristic the fur-seal undoubtedly possesses to a most remarkable degree, so that its case might with justice be considered as closely analogous to that of pigeons in a large dovecote, whose every flight into the country in search of food the owner could not be supposed to accompany or even be cognisant of, and of whose number and identity he would be ignorant. It was contended on the British side that the voluntary return of the seals to the islands does not make them the subject of property, for their intention must be not only to return to the islands, but to return to the control and care of their owner. But there is no ground for such contention, and it might, on the other hand, be argued that the pigeons, once established, would always return to their dovecote whether they had an owner or not. These arguments, it is evident, might be extended to fill volumes without being anywhere nearer finality, and the subject has only been introduced here with the object of showing how futile it would be to attempt to arrive at any satisfactory solution of the question on these lines. Even were it definitely decided that the fur-seal should be held to be private property of the United States Government, its safety could hardly be considered more assured than in times past. Such vast preserves as the North Pacific it would be quite beyond the power of that nation effectually to guard, and she could scarcely look to the other Powers to act as her gamekeepers. The profits of the sealing schooners are so large that almost any risk would be braved

by them. If "pelagic" sealing is to be suppressed at all, it can only be by the concurrence and aid of the nations interested in the survival of the animal; but such aid could only be afforded on the understanding that the seal is *res nullius*.

The award itself, however, does not concern the zoologist so much as the regulations thereto appended for the future management of what is conveniently, if inaccurately, termed the "seal-fishery." As to the capability of the arbitrators to adjudicate upon difficult points of international law almost all are agreed. How far they were qualified to draw up a series of regulations on such a difficult and technical subject as the management of a seal-fishery is quite another question. None of these gentlemen, it may be hazarded, have been at any period of their career either professed seal-hunters or naturalists. It is even possible that, in some instances, their knowledge of the animal upon whose fate they had to decide may have been limited to the admiring contemplation of ladies' jackets composed of their skins. Without a somewhat larger stock-in-trade of experience it is difficult to see how any conspicuous success could be anticipated. Moreover, the task was rendered still less easy by the fact that the regulations affected two nations only, while the rest of the world were at liberty to act as they pleased. But, considering that their powers were thus limited, it may be said that the arbitrators have not been unsuccessful, and that their regulations ought to be attended with marked benefit to seal-life if properly enforced. Exception might no doubt be taken to many of them, and they are by no means conspicuous for lucidity of expression; but if universally

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adopted by all nations, it is possible that they may even suffice for a permanent settlement of the Bering Sea difficulty. It is worthy of remark that no regulations limiting, or in any way interfering with the island "take" of skins occur. Almost all are directed to the partial restriction of "pelagic" sealing, and thus the verdict of this part of the award may be regarded as a more or less complete victory for the United States—at all events upon paper.

The regulations are embodied in nine articles. They run as follows, and will be commented upon separately in their order:—

"*Article I.* The Governments of the United States and Great Britain shall forbid their citizens and subjects respectively to kill, capture, or pursue at any time, and in any manner whatever, the animals commonly called fur-seals, within a zone of sixty geographical miles around the Pribilof Islands, inclusive of the territorial waters."

Passing over the fact that "a zone of sixty miles" is by no means the same thing as a circle with a radius of sixty miles, which appears to be what is meant, it will be noted that, since the agreement is only between the two Powers, vessels under the flag of all other nations, by whom the universal three-miles limit is the only one recognised, will be at liberty to take seals as they please within this area. Unless, therefore, the other Powers be willing to accept the regulations, it is manifest that immediate advantage will be taken of this loophole. Canadian and American capital will doubtless cross the Pacific to assist the Japanese schooners, and beyond the fact that the red ensign and the stars and stripes will be conspicuously absent from the protected area, there will prob-

ably be no change in "pelagic" sealing, except it be in the shape of increase. The frequent impossibility of judging with any accuracy of the boundary in a sea so persistently beset with dense fog is likely to entail innumerable difficulties, and disputed seizures will probably become even more frequent than heretofore. The protected area is too large to be efficiently guarded without difficulty, and both for this reason and on account of the establishment of an inadvisable precedent might well have been substituted by a further extension of the close season.

"*Article II.* The two Governments shall forbid their citizens and subjects respectively to kill, capture, or pursue, in any manner whatever, during the season extending each year from the 1st May to the 31st July, both inclusive, the fur-seals on the high sea, in that part of the Pacific Ocean, inclusive of the Bering Sea, which is situated to the north of the 35th degree of N. latitude, and eastward of the 180th degree of longitude from Greenwich, till it strikes the water boundary described in Article I. of the Treaty of 1867 between the United States and Russia, and following that line up to Bering Straits."

This article, in plainer words, decrees a close season throughout the whole extent of American waters occupied by the fur-seal. In principle and practice a close season is much to be preferred to a protected area. It is in accordance with what is known to be beneficial in similar cases, and is more easy of enforcement than the latter. We still have to do, of course, with the same inability to compel foreigners to comply with the regulation as in Article I.; but if this disturbing element be disregarded, this article will affect "pelagic" sealing not a little, if it can be strictly carried out. For,

since the schooners commence operations tolerably early in the year, and are usually laid up about the beginning of October, the close season comes not only in their best months but also in the middle of their commission. At the time of its commencement the seals are beginning to enter Bering Sea, and the vessels are consequently an enormous distance from their ports, to which they have no alternative but to return. A second commission on its termination would be impossible, and hence the pelagic catch would end with April. This should have a good effect as regards the protection of pregnant females, which do not land on the Prybilovs until about the first week in June. The close season might with advantage have commenced earlier within the limits of Bering Sea, but in that case "pelagic" sealing would practically have been put an end to, and this it was evidently not the intention of the tribunal to permit. The "take" of the schooners will now be more or less limited to the "grey pups" or young seals found off the American coasts in the earlier part of the year, which are for the most part males, or, if females, do not carry young.

"Article III. During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing-vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing-boats."

This clause was imperatively necessary, unless it was desired to stultify all others, for the general adoption of steamers by the pelagic sealers would at once do away with all hope of enforcing the laws re-

lating to boundaries. The fogs of Bering Sea and the size of the protected area will already render this a matter of difficulty; but if the guard-vessels had also to contend with steam-power, even if inferior to their own, their task would become impossible. The phrase "take part in" seems of doubtful interpretation. If it should be held to include the receiving steamers that perform the same office for the sealing-schooners as do similar vessels for the North Sea fishing-fleet—namely, taking their catch and affording them supplies—the sealers will be put to considerable and unnecessary inconvenience; but it is more probable that the prohibition will be restricted to the vessels actually engaged in fishing.

Article IV provides that

"each sailing-vessel authorised to fish for fur-seals must be provided with a special licence issued for that purpose by its Government, and shall be required to carry a distinguishing flag to be prescribed by its Government," and calls for no comment.

"Article V. The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log-book the date and place of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season."

Could such a regulation be accurately carried out, it would in time definitely settle the many disputed questions as to the distribution, migration, and sex-proportion of the fur-seal during its ocean existence, and would thus be of the greatest assistance to naturalists, for whom otherwise the complete life-history of the animal must always remain an in-

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soluble problem. The acquisition of this definite information would, moreover, materially lessen the difficulties of future legislation. But unfortunately, from the nature of things, the data thus obtained could never be accepted as trustworthy. The "pelagic" sealer has as enemies both his own kind and the revenue cruisers of the United States Government, and the pelagic sealer is not immaculate. Should the excitement of the chase lead him across the boundary, and bring him to a happy hunting-ground, he could scarcely be expected to record the details of the operation with strict geographic accuracy. Were a raid upon the islands to be successfully carried out—and he would be a bold man who would affirm that no raided skin has as yet found its way into a sealing-schooner's hold—it is hardly likely that the event would be entered in the ship's log. Nor is it probable that a captain, having once discovered a good locality, would be desirous of publishing its whereabouts to the world at large. Even granted the *bona fides* of the recorder, the fogs of Bering Sea are such as to render his records at best conjectural. As regards place, sex, and date, therefore, the returns are not likely to be unimpeachable.

"Article VI. The use of nets, firearms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shot-guns when such fishing takes place outside of Bering Sea during the season when it may be lawfully carried on."

This may be described as one of the most important of the nine regulations. In former days the seals were almost always taken by the spear, or in rare cases, like the

sea-otters, with the bow and arrow. Until quite lately Aleutian and other natives were always employed on the sealing-vessels, but since the general adoption of firearms this has not been the case. The weapon most frequently used is not the rifle, but the gun, and few sportsmen will be found to deny that by its use a very considerable percentage of the animals fired at must get away more or less severely wounded. With the spear and throwing-stick hardly a single seal escapes if struck. If missed it is clean missed, and gets off unharmed. The regulation then is both wise and sportsmanlike, but it is very far from being acceptable to the sealer. For to admit of the use of the harpoon the animal must be closely approached, necessitating a noiselessness and caution that are the special property of the native hunter, and the number thus approachable is of course far below that of those offering possible shots. Only the "sleepers," as they are termed, will thus for the most part be obtained; the "travellers," or swimming seals, will more rarely be brought to bag. Outside Bering Sea the use of the shot-gun is to be permitted. Why the rifle should not equally, or preferably, be allowed it is not easy to understand, for it can claim in many ways the same freedom from objection as the spear.

"Article VII. The two Governments shall take measures to control the fitness of the men authorised to engage in fur-seal fishing. These men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on."

This clause has no doubt afforded considerable amusement to every

one with any knowledge of the subject, with the exception, presumably, of the arbitrators. It has met with unsparing ridicule on both sides of the Atlantic, and it is suggested, with some show of probability, by a writer in the 'Field,' that it "has been inserted at the instigation of some well-meaning person who has his mind filled with stories of the cruelties inflicted by the Aleuts intrusted with the slaughter of the animals in the Alaska Company's islands," stories which have been conclusively shown to be incorrect. It is unnecessary here to point out the vagueness, inutility, and general ineptitude of the clause. We need have no fear that the sealing captains will endeavour to select the worst men, those least "fit to handle with sufficient skill the weapons by means of which this fishing may be carried on."

"Article VIII. The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States, or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in connection with other vessels, and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each, in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur-seals outside of territorial waters under contract for the delivery of the skins to any person. This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Bering Sea, or the waters of the Aleutian Passes. Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur-sealing vessels as heretofore."

The meaning of this would seem

to be that permission to kill seals for their own use at any period of the year, and by any weapon, is extended to all Indians, except such as are unfortunate enough to inhabit the Aleutian Islands: a regulation which seems to bear hardly on the latter, although it must be admitted that the temptation to make the most of the advantages that their position affords, and to embark upon sealing as a trade would be probably too strong to be resisted. In past days the toll taken of the herd by the natives during the yearly migrations was comparatively insignificant. Since the value of the skins has become known to them, it is no longer so, and it is perhaps only fair that it should be checked.

This article is the last dealing with the question of the protection of the fur-seal; Article IX. merely providing that the regulations

"shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain. The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof."

Before submitting their case to arbitration it was agreed that the two interested parties "should consider the result of the proceedings of the tribunal of arbitration as a full, perfect, and final settlement of all the questions referred to the arbitrators," and the same assent may be held to be implied with regard to the concurrent regulations. But this assent should be dependent upon Lord Salisbury's previous contention that they should be universally adopted by

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all nations. Upon this point their success or failure may be said to hang. Until the adoption is a *fait accompli* the award is so much waste paper, for it is hardly probable that the United States and Canada would tamely submit to sit still while the sealing fleets of other nations were engaged in appropriating the spoil. This, then, is the *sine quâ non* of settlement. Assuming acceptance by the other Powers, the question arises whether the rules drawn up by the arbitrators are fair and equitable, and whether they will suffice for the purpose for which they were intended. It was admitted on all hands that the extermination of the fur-seal is to be avoided, and it was equally admitted, if both the "pelagic" and island killing were allowed to remain unchecked, that practical, if not actual, extermination would ensue. Which side, then, was to yield? The question resolved itself into a choice of one of three methods: (1) Of partial restrictions on both sides; (2) partial or complete restriction of the island "take"; or (3) partial or complete restriction of "pelagic" sealing. For the elucidation of the problem, evidence and argument sufficient to need seven Blue-books for their embodiment were adduced by the contesting parties. Much of this, as has before been stated, was of the most contradictory and puzzling nature; but that many points came out most clearly and unequivocally is conclusive^v shown by the regulations, which may be regarded as a verdict given upon the evidence, and the outcome of a careful and lengthy investigation. The most important of these points are those connected with the killing of seals at sea. The Americans contended, among other things, that the greater number

of those so killed were females, of which most were carrying young; that of those fired at in the usual manner with buckshot or "loopers" many got away wounded, to perish uselessly and painfully; that of those killed many sank before they could be picked up by the boats; and that the system of "pelagic" sealing thus caused considerable and unnecessary waste of life. All these points may be said to have been sufficiently proved. The evidence with regard to the first is overwhelming. The leading London furriers, those of America, the Canadian Minister of Marine and Fisheries, Rear-Admiral Hotham, the Canadian Fisheries Report of 1886, and a host of trustworthy witnesses,—all testify to its truth. It is not even denied by those who support sea sealing, who are reduced to the plea that the killing of females is necessary for the preservation of the normal proportion of the sexes! This was in reality the crucial point. Passing to the question of the waste of life alleged to be inseparably connected with sealing on the high seas, it may boldly be asserted that such waste of life, to a greater or less extent, is self-evident. It is unnecessary to take into serious consideration the vague statements of sealers, which were brought forward to support the contention that no seals get away to die of their wounds. One witness, for example, declares that "not more than one in fifty wounded seals will die afterwards;" and another states that as he "always gets badly wounded seals, those that escape are not likely to die." Numerous other affidavits of a like character were advanced in evidence, but need not be repeated here. Their only possible use would be to amuse sportsmen.

It cannot be meant seriously to suggest that the seal differs from every other animal shot by man in this respect. So, too, with regard to the sinking of seals when shot. Plenty of them, no doubt, do not sink; and it is quite possible that the number of those that do has been exaggerated. That none do so, no one who has seen a 12-foot sealing-gaff believes.

It was presumably, then, a consideration of these and similar points which led the arbitrators to adopt the last of the alternatives above mentioned, and to decide on a partial restriction of "pelagic" sealing. That it was a wise and at the same time a fair decision, almost every zoologist or sportsman who has given

any consideration to the subject will allow. If it be granted, as it is, that both sea and island killing cannot coexist without certain extinction, then one or other must go to the wall; and it is evident that the worst method should suffer. A system whereby a large preponderance of females are killed and an unnecessary waste of life takes place is manifestly inferior to one which carries on its operations on the best principles of stock-farming, and has a direct pecuniary interest in keeping up the number of the breeding animals. The arbitrators deserve the thanks of all those interested in the question for having realised, and given expression to, this fact.

F. H. H. GUILLEMARD.

[Nov. 1893.

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